1969

John Hellstrom, Dba Diesel Service Company v. D. A. 0Sguthorpe : Plaintiff And Respondent's Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN HELLSTROM, d/b/a
DIESEL SERVICE COMPANY,
Plaintiff and Respondent,

vs.

D. A. OSGUTHORPE,
Defendant and Appellant.

Case No. 11462

Plaintiff and Respondent's Brief

Appeal from the Judgment of the Third Judicial District Court in and for Salt Lake County, Utah Honorable Stewart M. Hanson, Judge

RICHARD L. BIRD, JR.
RICHARDS AND WATKINS
Attorneys for Respondent
720 Newhouse Building
Salt Lake City, Utah 84111

SNOW, WORSLEY & CHRISTENSEN
Attorneys for Appellant
Continental Bank Building
Salt Laket City, Utah 84101

TABLE OF CONTENTS

INDEX OF CASES CITED

INDEX OF OTHER AUTHORITIES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN HELLSTROM, d/b/a
DIESEL SERVICE COMPANY,
Plaintiff and Respondent,

vs.

D. A. OSGUTHORPE,
Defendant and Appellant.

Case No.
11462

Plaintiff and Respondent's Brief

STATEMENT OF FACTS

Appellant's brief under "Disposition in Lower Court" states that the plaintiff's Motion for Summary Judgment was granted by the Court "without even considering the Court file or the depositions." There is no support whatever for this bald assertion. The file shows that the Motion for Summary Judgment was opposed by appellant's affadivit, that the matter was fully

argued on November 15, depositions introduced, that a proposed Summary Judgment was served on November 18 and signed by the Court on November 20. This is all recited in the summary judgment (R-33) and appellant cites no support for his charge.

Appellant's Statement of Facts, Page 2, states that when Clarence Osguthorpe picked up the truck he signed "a blank repair order form." The affidavit of Clarence Osguthorpe (R-30) identifies the document attached to plaintiff's reply as being the document he signed but states that only the amounts were not on the document at that time.

Appellant's brief states that defendant "objected" to the cost of repairs. His deposition (Page 12) states that the plaintiff "explained why it had run more money than what he had said" and does not contain any word of objection or dissatisfaction.

Appellant's brief then states that after the voluntary repairs made by plaintiff in June, 1967, the truck "still did not perform satisfactorily" but there is no statement by either Clarence Osguthorpe or the defendant that this was ever reported to the plaintiff and the plaintiff testified that no complaint was made to him subsequent to the work done in June, 1967 (Hellstrom deposition, Page 30).

Plaintiff's Statement of Facts then states that "at no time did the parties agree on any settled amount for the work" which is the basis of respondent's claim that

as a matter of law there was an agreement through the furnishing of the full statement and the payment on account which is not denied.

Appellant's brief (Page 3) then states that defendant denied the authority of Clarence Osguthorpe to bind him on a contract providing for attorney's fees and interest. Defendant at no time denied the authority of Clarence Osguthorpe, and indeed intimated that he was probably an owner of the business when he said in his deposition (Page 21) that "We always go by Osguthorpe Brothers" and stated only that he was "not willing to be bound by" a document which was not filled in. (Osguthorpe deposition, Page 15). Clarence Osguthorpe appears to have an ownership interest from the language of his affidavit. (R-31).

At the top of Page 4 appellant points out that the Clarence Osguthorpe deposition "had not been filed in the Court and is not even a part of the record on appeal." The affidavit of Clarence Osguthorpe is a part of the record (R-20 to 31), having been filed on the day of the argument of the Motion for Summary Judgment, apparently in lieu of the deposition. Counsel for defendant stated that he did not have the deposition of Clarence Osguthorpe filed "and that is why I am introducing this affidavit at this time." (R-56). Counsel for plaintiff then stated that he had copies and could supply one and Mr. Burton stated that there were not any corrections and chose to rest on the affidavit rather than produce the deposition and when counsel for plain-

tiff stated that the affidavit agrees with the deposition the defendant made no further comment. (R-57).

At Page 8 appellant argues that information as to the plaintiff's markup on parts and outside work was not before the Court (Appellant's brief, Page 8). That is, of course, because appellant wrote his brief without reading a transcript of the proceedings on November 15, 1967 from which it plainly appears that this information was elicited and was before the Court. (R-50 to 55).

And at Pages 10 and 11 of his brief appellant argues that there was nothing before the Court on the matter of attorney's fees. This matter was also covered and appears in the supplemental transcript. (R-55 to 57).

POINTS OF ARGUMENT

1. Is this a case for summary judgment?
2. Is the price of the work established?
   A. On the theory of account stated?
   B. As being reasonable?
3. Is plaintiff entitled to attorney's fees?
   A. Is the agreement sufficient?
   B. Is the proof sufficient?
4. Was interest properly allowed?

ARGUMENT

1. *Is this a case for summary judgment?*

Appellant argues that summary judgment should not be granted to prevent a party from presenting his evidence except when it appears that there is no genuine issue of material fact (Brief, Pages 17 and 19). We agree. It should be observed here that depositions of the parties were taken as well as the deposition of Clarence Osguthorpe and in lieu of producing his deposition defendant filed an affidavit as to the participation of Clarence Osguthorpe in the transaction. Nowhere does the defendant point out any evidence or type of evidence which he desires to present more fully than was covered in the deposition or the affidavit.

In other words, it appears that by the use of depositions and affidavits both parties were able to present their evidence without a trial. Is there a genuine issue as to a material fact?

Respondent recognizes that the rule is that on a motion for summary judgment the evidence will be viewed by the reviewing court most favorably to the loser. *Thompson vs. Ford Motor Company,* 16 Utah 2d 30, 395 P 2d 62. The basic consideration still is whether there is a genuine issue of fact. *Larsen vs. Christensen,* 21 U 2d 219, 443 P 2d 402. The mere assertion that a fact issue exists does not preclude the granting of summary judgment. *Foster vs. Steed,* 19 U 2d 435, 432 P 2d 60; *Leininger vs. Stearns-Roger*

Manufacturing Company, 17 U 2d 37, 404 P 2d 33. Furthermore, the unresolved issue of fact must be an issue which must be resolved by the Court to determine the legal rights of the parties. ***FMA Finanical Corporation vs. Build, Inc.,*** 17 U 2d 80, 404 P 2d 670.

In his brief the appellant contends there are issues of fact on the following matters:

(1) There was an agreement between the parties for repairs at a specified price. (Page 6)

(2) The work was to be done at reasonable costs with an estimate by respondent. (Page 8)

(3) When was the account past due? (Page 9)

(4) There is a dispute as to reasonable attorney's fees. (Page 10)

(5) There is no agreemnt as to the amount due and owing. (Page 12)

(6) Defendant contends he has not accepted the work. (Page 13)

(7) Did Clarence Osguthorpe have authority to sign the repair bill? (Page 14)

(1) *There was no agreement between the parties for repairs at a specified price.*

Defendant in his deposition gave as the figures of the estimate $1,800 to $1,900 initially and then increased that by $400 to $500 with a statement attributable to plaintiff that "I'm sure I can repair it for this amount"

and the defendant's response, "We don't want to spend any more money than this." (Osguthorpe Deposition, Page 11). This still is an estimate and not a contract and the total of $2,500 is within a reasonable range of the final figure on the billing of $2,784.57.

(2) *The work was to be done at reasonable costs with an estimate by respondent.*

This is a corollary of the first statement and is stated separately by appellant (Pages 6 and 7). The respondent testified as to the number of hours spent on the truck and that he scaled that down as he usually does (Hellstrom Deposition, Pages 22 & 32-33) and that his mark-up on parts and outside work was the standard practice in the industry. (R-51 & 54).

Whether the charges made were reasonable is an issue raised by the allegation in the Complaint that the work was to be at the "reasonable and agreed price of $2,784.57" which was put in issue by the answer. But as the evidence developed, it was that the original invoice or statement was delivered to Clarence and then to the defendant (Osguthorpe Deposition, Page 13) and after the June repairs a further statement was delivered to the defendant (Osguthorpe Deposition, Page 16-17) and that thereafter a payment of $500.00 was made (Osguthorpe Deposition, Page 17) which amounted, in the contemplation of law, to an agreed balance of the nature of an account stated.

(3) *When was the account past due?*

Appellant's own authority at Page 9 is that th account was due immediately, in the absence of an other circumstances. There were no other circumstance here and respondent gave appellant the benefit of th doubt by considering the account due following the com pletion of repairs to make the job satisfactory an accepted, there having been no further complaints. Fo convenience respondent used the 10th of the followin month as the due date with the statement "No late than July 10, 1967". Appellant points to no fact whic raises an issue as to this.

(4) *There is a dispute as to reasonable attorney fee.*

Appellant did not have the supplemental tran script before him and the stipulation of counsel seem to cover the necessity of proof on this point under th authority cited by appellant on Page 11 of his brie

(5) *There is no agreement as to the amount du and owing.*

This is raised by appellant at Page 12 of his brie and is actually answered under points (1) and (2 considered here. The law is argued under point 2.

(6) *Defendant contends he has not accepted th work.*

Plaintiff testified that following the repairs i June he had no complaint as to the truck and the d

fendant acknowledged this and attempted to justify his failure to make complaint by saying he was not satisfied with the treatment he had received (Hellstrom Deposition, Page 30, Osguthorpe Deposition, Page 18). The fact remains uncontroverted that the work was accepted and no further complaint was made.

(7) *Did Clarence Osguthorpe have authority to sign the repair bill?*

Clarence Osguthorpe delivered the truck to the plaintiff and this was known to the defendant. (Osguthorpe Deposition, Pages 9 & 13). Proper delivery of the car was made to the person who had brought it in with authority confirmed by defendant's conversations with the plaintiff.

Defendant received the original bill with the signature of his brother on it and the agreement to pay attorney's fees. (Osguthorpe Deposition, Pages 13, 15, 16) and then received a similar bill with the June repairs on it and the final balance (Osguthorpe Deposition, Pages 16, 17). His only explanation was that he did not read the agreement. (Deposition, Page 16). Defendant was charged with knowledge of the agreement and at no time denied the authority of his brother.

2. *Is the price of the work established?*

A. *On the theory of account stated?*

Appellant challenges use of the phrase "account stated" on Pages 12 and 13 of his brief. Respondent

took the position in the Motion for Summary Judgment that the balance here is established as being in the nature of an account stated. It is true that there was not a large number of transactions, but there were two transactions, the main repair job in January and February, 1967 and the additional repairs in June, 1967, followed by the rendering of a complete bill following which and in October 1967 there was a payment on the account of $500.00. (Osguthorpe Deposition, Pages 13, 15 and 17).

Following the quotation made by appellant at Page 12 of his Brief from Section 21 of 1 Am Jur 2d on Accounts and Accounting appears this:

> "It is now the accepted rule that an account stated may be based upon a single item, or upon an account in which all the items are on one side. To effect an account stated the outcome of the negotiations must be the recognition of a balance due from one of the parties to the other with a promise, expressed or implied, to pay that balance."

and at Section 24 it is stated:

> "If the statement is in writing, it need not be signed; it is sufficient if it has been examined and accepted by both parties, and acceptance of the account may be implied from circumstances."

and at Section 28:

> "An account stated predisposes an absolute acknowledgmen or admission of a certain sum due, or an adjustment of accounts between the

> parties, the striking of a balance, and an assent to the correctness of the balance, which assent assent may be either expressed or implied."

and a partial payment has been regarded as an implied assent or promise to pay the balance.

The seller of the service, having rendered a complete statement, the assent of the defendant is to be found both in retaining the statement without complaint, and in his having made a payment on account. *Harris vs. Merlino,* 137 N.J. 717, 61 A 2d 276 at 279; 1 Am Jur 2d, Accounts and Accounting, Section 24; Restatement of Contracts, Section 422 (1); Williston on Contracts Revised Edition, Section 90 B.

The Motion for Summary Judgment states that there is no substantial issue as follows: "8. After rendition of the bill to the defendant in the amount of $2,784.57 and after the charges of $6.75 in June the defendant on October 6, 1967 paid $500.00 on the account leaving a balance of $2,291.32." (R-27)

The defendant in his deposition stated that after the work was done he received the bill and discussed the amount of it with the plaintiff. There was no statement that the bill was disputed or challenged in any way and the only further comment was that the truck was not operating satisfactorily, which was subsequently remedied. (Osguthorpe Deposition, Pages 13 to 14).

B. *As being reasonable?*

Plaintiff didn't make any point of the reasonableness of the charges, since the rendering of the account

and the acknowledgment of its correctness by the payment was the essence of his case. But in the deposition of the defendant Mr. Osguthorpe stated that he was not an authority "on the price of truck parts" or as to charges for labor. (Osguthorpe Deposition, Page 18).

In the deposition taken of the plaintiff in response to questions asked by the defendant plaintiff testified that has labor charges were his standard charges (Page 22), that he charged "the going rate at that itme" (Page 22), that the total hours were 112 and that these were adjusted to 98 (Pages 32 and 33), and when he was compelled to answer questions as to mark-ups on parts and on outside work the plaintiff testified that he used standard and competitive mark-ups (R-51, Lines 24 to 26, R-54, Lines 13 to 16).

And again, the payment of a part of a completed statement forecloses the issue as to amount due, in the absence of fraud which is not even hinted at in the pleadings or the depositions.

3. *Is plaintiff entitled to attorney's fees?*

A. *Is the agreement sufficient?*

The signed statement is that "purchaser agrees to pay attorney fees, legal fees and all expenses involved in the event legal action is necessary for the collection of the repair order." (R-10). The reference to it as a repair order and not as a finalized bill on the face of the document establishes a definite contract.

Defendant questions the authority for the signature in his brief. (Pages 14-15). In his deposition the defendant's only question was wether he should be bound when a blank invoice is signed, although he was wrong about this being a blank invoice. (Osguthorpe Deposition, Pages 15-16; Clarence Osguthorpe Affidavit, R29). An agent my bind his principal in a matter incident to his recognized authority. Blashfield, Encyclopedia of Automobile Law and Practice, Section 5034. The person delivering the car has apparent authority to bind the principal as to terms of repair. Blashfield, Section 5104; *Cotton vs. Garrell,* 180 Mo. App. 118, 167 SW 1187, Corpus Juris Secundum, Agency, Section 102.

Defendant, having received the repairs and the bill, without objection to the agent's authority, has ratified it, on principle of estoppel. C.J.S. Agency, Section 29, Page 1063; *Thompson vs. Collier-Reynolds,* 155 Ark. 355, 244 SW 355; *Dell Wood Tires vs. Miss,* (Mo. App.) 198 SW 2nd 347, 353.

B. *Is the proof sufficient?*

At Pages 10 and 11 of his brief appellant attacks the allowance of attorney fees and suggests that the plaintiff offered no proof. At the hearing on November 15 the invoice which was Exhibit 1 was introduced in evidence and the Court said: "If Mr. Bird were called to testify would you agree $500.00 is a reasonable fee? I think that is what he is asking for, isn't it?"

Mr. Burton: "I think that is not in dispute."

Mr. Bird: "I calculated this at $597.00." (R-55) Mr. Burton then went on to the matter of the Clarence Osguthorpe affidavit and the Court then said: "Let's get back to the attorney fee. Would you agree, if he testified, that there would be a reasonable fee?"

Mr. Burton: "I would." (R-56, Lines 26 to 29)

These stipulations were overlooked by the appellant in his brief.

4. *Was interest properly allowed?*

This raises questions as to the amount of interest and the time when it started. The complaint asked for interest from February 10, 1967 (R-2) and at the maximum legal rate as provided by the contract (R-10).

Appellant's own authority on Page 9 of his brief states that "in the absence of any circumstances indicating a different intention an account is payable immediately." The agreement here provided for interest at maximum legal rate on all past due accounts (R-10).

Respondent, desiring to eliminate matters on which there was a substantial issue, waived interest from February through June for the reason that additional repair work was done on the truck in June 1967. Rather than commence interest immediately, interest was calculated from the 10th of the following month, which it is submitted is a reasonable date for payment and commencement of interest, there being no evidence of any com-

munication to the plaintiff of the failure of the truck to work satisfactorily in every way after the additional work was done in June 1967 (Hellstrom Deposition, Page 30).

There is no genuine issue as to due date of the repair bill when work was completed February 27, 1967. No complaint was made until plaintiff was called about payment of the bill (Hellstrom Dep. P. 13). Every question as to due date has been resolved to benefit appellant.

CONCLUSION

Appellant points out no areas of genuine issue of substantial fact. Appellant's unsupported statement that there are issues for a jury trial does not raise a "genuine issue."

The balance owing was fixed, the appellant assented to it by acquiescence and partial payment. There is no basis for challenge of the authority of Clarence Osguthorpe from any statement in the affidavit or deposition. The payment ratified the authority and the terms. The attorneys fees were resolved pursuant to stipulation. The judgment should be confirmed.

Respectfully submitted,

Richard L. Bird, Jr.
for Richards and Watkins

Attorneys for plaintiff-respondent